In the High Court of Judicature at Madras

Dated 27.06.2007

Coram

The Honourable Mr.Justice S.R.SINGHARAVELU

Appeal Suit No.150 of 1995

Syndicate Bank, rep.by its
Manager V.Jethonan,
Ootacamund ..Appellant(Plaintiff)

..vs..

1. K.Prakash
2. J.K.Javarappa ..Respondents/(Defendants)

Appeal Suit filed under Section 96 of Civil Procedure Code, against the judgment and decree dated 28.02.1992 made in O.S.No.260 of 1990 on the file of District Judge of the Nilgiris, Ootacamund.

For Appellant : Mr.K.Chandrasekaran

For Respondents: No appearance

JUDGMENT

This appeal arises against the judgment and decree of the learned District Judge, Ootacamund, in O.S.No.260 of 1990 dated 28.02.1992, in dismissing the suit for money claim against second defendant and decreeing only against first defendant. Aggrieved over the dismissal of the suit against second defendant, a guarantor, the plaintiff bank has preferred this appeal.

2. There was an overdraft facility obtained by first defendant from plaintiff bank for his business and that was made at the instance of the request of first defendant on 19.05.1986. Second defendant guaranteed the repayment of the above said loan. Therefore, both joined together and executed a pronote on 19.05.1986 for a sum of Rs.25,000/- in favour of appellant/plaintiff bank and that was marked as Ex.A-2. There was also a hypothecation deed under Ex.A-3 executed by both as security for the said loan. Thus, first defendant was the principal debtor and second defendant was only a guarantor.

3. A sum of Rs.1,000/- was repaid by first defendant on 03.02.1987 and there was an acknowledgment by first defendant, the principal debtor. Construing as a starting period of limitation, the

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plaint was filed on 11.12.1990. There was also an acknowledgment of liability made by first defendant under Ex.P-7, which is dated 11.08.1988. So, the suit was rightly decreed by construing the starting period of limitation as 11.08.1988 and the suit was filed within three years thereof. The suit was dismissed as against second defendant/guarantor because he never signed in Ex.P-7 or on the date of repayment of Rs.1000/- by first defendant on 03.02.1987. Therefore, it was found by the trial court that as against second defendant, the guarantor, the suit is time barred because it was not filed within three years from the date of pronote (19.05.1986).

4. Learned counsel for the second respondent relied on Mercantile Credit Corporation Ltd., Tiruchirapalli .vs. A.Velusamy and another(2001-1-L.W.308), wherein it was held as follows:

> "To sum up, the making of an acknowledgment of liability by the principal debtor viz., the 1st defendant does not involve any variance of the original contract under Ex.A2 and Ex.A26 within the meaning of Section 133 of the Contract Act. It also does not involve the making of another contract or a fresh contract under Sections 134 and 135 whereby the creditor discharges the debtor or makes a composition with him. In fact the effect of acknowledgment of liability by the 1st defendant alone under Exs.A27 to A38 is just the contrary to the creation of another contract or fresh contract".

Of course, in that case, it was held that suit claim as against 2nd defendant guarantor was barred by limitation.

5. In that case law, reliance was made upon Indian Bank, Madras .vs. Krishnaswamy (AIR 1990 Madras 115 = 1989-2-L.W.105), where the loan was given by the bank to the mill and the plaintiff in that suit stood as surety. The mill was subsequently taken over by the Government and there was a fresh agreement between the Government and the mill, which was not made known to the surety and therefore it was held that the surety was discharged from that liability.

6. But in the case of Mercantile Credit Corporation Ltd., there was no fresh agreement entered into and the acknowledgment of principal debtor should be treated as that of the surety as such a finding was given in Wandoor Jupeter Chits (P) Ltd., ..vs. K.P.Mathew (AIR 1980 KERALA 190), wherein the following observation was made;

> "13. Acknowledgment of the debt under Section 18 of Limitation Act, which provides for a fresh period of limitation, would itself be sufficient in the context of a contract of guarantee to keep the surety's liability alive. Surety's contract being separate and collateral could not be equated to that of a co-debtor or joint contractor within the meaning of Section 20(2) of Limitation Act, so that the surety could not plead that the

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written acknowledgment of the debtor could not keep his surety's liability alive. The surety could also plead discharge under Section 133 of the Contract Act since the debtor's acknowledgment would not create a contract different from the one of the performance which the surety had guaranteed.

7. In AIR 1980 KERALA 190, it was observed as follows:

"11. The law of limitation is based on public policy and expediency, and generally stated, it only disables the litigant who has not been vigilant, from getting the aid of the State in enforcing his claim. It does not destroy the litigant's right, but only puts an end to the accessory right of action. It is procedural, notwithstanding that in some rare cases like those under Ss.25 and 27 (of the Act of 1963), rights are sometimes created and sometimes extinguished. In Mahant Singh vs. U.Ba Yi (43 Cal WN 641): (AIR 1939 PC 110), the Privy Council held that failure to sue the principal debtor till recovery is barred by the statute of limitation would not operate to discharge the surety, and that when S.2(j) of the Contract Act lays down that:

"A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable",

the unenforceability should arise from substantive law, and not from procedural regulations. The debt remains a debt even when the creditor by reason of a rule of procedure cannot himself bring an action upon it. In Bombay Dyeing & Mfg.Co. vs. State of Bombay (AIR 1958 SC 328), the Supreme Court held:-

> "Now, it is the settled law of this country that the statute of limitation only bars the remedy but does not extinguish the debt, S.28 of the Limitation Act (of 1908, which corresponds to Section 27 of the present Act) provides that when the period limited to a person for instituting a suit for the possession of any property has expired, his right to such property is extinguished. And the authorities have held-and rightly, that when the property is incapable of possession, as for example a debt, the Section has no application, and lapse of time does not extinguish the right of a person thereto".

If a debt barred by limitation is not extinguished, an acknowledgment designed to place it beyond the pale of unenforceability, cannot certainly after its nature or character, or that of the contract on which it is founded, so as to enable the surety to disown his obligation".

8. Even in Subramania Aiyar .vs. Gopala Aiyar ((1910(ILR 33 Mad 308), it was observed as follows:

"Whenever procedural actions are barred, the rights

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themselves are not extinguished.... Unless a law of limitation operates as well as a law of extinctive prescription, omission to sue cannot discharge the debtor. Limitation which merely bars the remedy is never spoken of in modern jurisprudence as a mode of discharging an obligation..... It would therefore seem to follow that, as a mere omission to sue does not discharge the principal debtor, the surety is not discharged under S.134 of the Indian Contract Act. It has been argued that the surety will be prejudiced if he is liable to be sued when he cannot have any remedies against the debtor after a suit against him has become barred. The answer is he is himself to blame. He can easily avoid the risk and clothe himself with all the creditor's rights by payment or performance as soon as the debtor becomes liable".

9. Therefore, the following was observed in AIR 1980 Kerala 190;

"To sum up, the making of an acknowledgment by the principal debtor does not involve any variance of the contract within the meaning of Section 133 of the Contract Act. It also does not involve the making of another contract under Sections 134 and 135 whereby the creditor discharges the debtor or makes a composition with him. In fact the effect of an acknowledgment is just the contrary. Nor is S.137 attracted because it has been held that mere forbearance to sue even for a time beyond the period of limitation does not operate to discharge the surety. An acknowledgment does not also impair the remedy of the surety against the debtor, under S.139. It follows that there is nothing in Sections 18 and 20(2) of the Limitation Act, or in the relevant provisions of the Contract Act, as contended for, to render the surety's collateral obligation unenforceable by reason of a written acknowledgment by the principal debtor".

10. Lastly, the ruling laid down in Popular Bank Ltd .vs. United Coir Factories (1961 Kerala LT 434) was confirmed in the aforesaid case in AIR 1980 Kerala 190.

11. Now, coming to the principal laid down in 1961 Kerala LT 434, wherein it was held that,

"...in respect of any debt incurred by the principal during the currency of the guarantee, the surety is liable so long as the debt is recoverable from principal; it does not matter that the principal has kept the debt alive by acknowledgments under S.19 of the Limitation Act or by payment under S.20, for by these acts, there is no renewal of the debt, and no new debt created which is not covered by the guarantee. The debt remains the same, namely, the debt guaranteed; only the bar of time against recovery is postponed. S.21(2) of the Limitation Act has no bearing, for

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a mere surety is not a joint contractor. His is a separate and collateral contract for the purpose of ensuring that the principal keeps his contract".

12. In that case, the first defendant was the principal debtor. The guarantor was the second defendant. The guarantee bond was executed under Ex.P4. Clause(b) shows that it is a continuing guarantee determinable only after three months' notice-there is no case that it has been so determined-and clause(c) states that the guarantee shall be applicable to the ultimate general balance. Therefore, it was made clear that in respect of any debt incurred by the principal during the currency of the guarantee, the surety is liable so long as the debt is recoverable from principal. It does not matter that the principal has kept the debt alive by acknowledgment under S.19 of the Limitation Act or by payments under S.20, for by these acts, there is no renewal of the debt, and no new debt created which is not covered by the guarantee. The debt remains the same, namely, the debt guaranteed; only the bar of time against recovery is postponed. This principle was followed as laid down in Gana Nath Sen .vs. Ranjith Roy (ILR.1942 (1) Calcutta 11). This was confirmed in later case law 1980 Kerala 190, which was followed in 2001-1-L.W.308.

13. In this case also, the debt remains the same and the contract regarding the liability also remains the same. Because of the subsequent acknowledgment and payment under Sections 19 and 20 of Limitation Act by first defendant, the principal debtor, the contract remains the same and what was postponed was the bar of limitation. The statute of limitation only bars the remedy but does not extinguish the debt. Whenever procedural actions are barred, the rights themselves are not extinguished. Thus, the payment of first defendant and the acknowledgment made by him is established and so long as the debt or liability of the principal debtor is alive, then the guarantor's liability also will survive. There need not be any separate acknowledgment from the guarantor. Therefore, there should be also a decree against the second defendant.

For the reasons stated above, the appeal is allowed and the decree and judgment of the trial court are set aside and the suit is decreed as prayed for. No costs.

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Asst.Registrar

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To

1.The District Judge,
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2.The Record Keeper,
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One cc to Mr.Chandrasekaran, advocate SR.No.32859

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